

REMARKS

Claims 1-15 are pending. By this Amendment After Final, claims 2-3 are canceled, and claims 1, 10 and 13 are amended. After entry of this Amendment After Final, claims 1 and 4-15 will remain pending in the present application.

Entry of this Amendment After Final is respectfully requested, as it is believed to put the claims in condition for allowance. The claim amendments do not add matter which would necessitate an additional search, as the added limitations are found in previously pending claims.

Claim Rejections under 35 U.S.C. § 103

The Examiner rejected Claims 1-9, 13 and 15 under 35 U.S.C. § 103 as being unpatentable over Harding, U.S. Patent No. 5,992,348, in view of Sherman et al., U.S. Patent Pub. No. 2002/0100431.

As an initial point in responding to this rejection, it is noted that Claim 1 has been amended to incorporate the limitations previously found in Claims 2 and 3 and Claims 2 and 3 have been canceled.

As acknowledged by the Examiner, Harding does not teach or suggest providing at least non-terminal aperture located between the joint members on the horizontal or vertical support members. The Examiner then cites Sherman et al. for disclosing a non-terminal aperture in a horizontal member of pet furniture.

In support of making the preceding combination of references, the Examiner indicated that “modifying the teachings of Harding with the teachings of Sherman at the time of the invention to give the bed structure a den-like feel as taught by

Sherman (Sherman paragraph [0015]) and to protect the animal from rain or sun exposure.”

To establish a *prima facie* case of obviousness, a rejection must cite documents which teach or suggest all the claim limitations,¹ establish a proper motivation for modifying the documents cited against the claims,² and show a reasonable expectation of success.³ The motivation to modify the documents cited against the claims must be present in the documents themselves, not in the instant application.⁴

If the proposed modification renders the prior art unsatisfactory for its intended purpose there is no motivation for the proposed modification.⁵ That the disclosures of the documents cited against the claims can be modified or that the asserted modification is within the ability of a person of ordinary skill in the art is not sufficient to

¹ See M.P.E.P. 2143 (“To establish a *prima facie* case of obviousness, the prior art reference (or references when combined) must teach or suggest all the claim limitations.”).

² See M.P.E.P. § 2142 (“To establish a *prima facie* case of obviousness, ... there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings.... The teaching or suggestion to make the claimed combination ... must ... be found in the prior art, and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991).”).

³ See M.P.E.P. § 2143 (“To establish a *prima facie* ease of obviousness, ... there must be a reasonable expectation of success. The ... reasonable expectation of success must ... be found in the prior art, not in applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991).

⁴ See M.P.E.P. § 2142 (“The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure.”).

⁵ See M.P.E.P. § 2143.01 (“If proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 U.S.P.Q. 1125 (Fed. Cir. 1984) (Claimed device was a blood filter assembly for use during medical procedures wherein both the inlet and outlet for the blood were located at the bottom end of the filter assembly, and wherein a gas vent was present at the top of the filter assembly. The prior art reference taught a liquid strainer for removing dirt and water from gasoline and other light oils wherein the inlet and outlet were at the top of the device, and wherein a pet-cock (stopcock) was located at the bottom of the device for periodically removing the collected dirt and water. The reference further taught that the separation is assisted by gravity. The Board concluded the claims were *prima facie* obvious, reasoning that it would have been obvious to turn the reference device upside down. The court reversed, finding that if the prior art device was turned upside down it would be inoperable for its intended purpose because the gasoline to be filtered would be trapped at the top, the water and heavier oils sought to be separated would flow out of the outlet instead of the purified gasoline, and the screen would become clogged).

establish the required motivation.⁶⁷ Moreover, neither conclusory statements within the rejection nor subjective opinion stated in the rejection are sufficient to establish the required motivation to modify the documents cited against the claims.⁸⁹ Additionally, evidence of patentability is established if the disclosures of the cited documents actually teach away from the asserted modification.¹⁰

Harding teaches a pet support having an outer perimeter with a support surface attached hereto. The Harding bed has vertical supports at each corner that maintain the support surface above the ground.

⁶ See M.P.E.P. § 2143.01 (“The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of me combination.”).

⁷ M.P.E.P. 2143.01 (“A statement that modifications of the prior art to meet the claimed invention would have been well within the ordinary skill of the art at the time the claimed invention was made because the references relied upon teach that all aspects of the claimed invention were individually known in the art is not sufficient to establish a *prima facie* case of obviousness without some objective reason to combine the teachings of the references. *Ex parte Levengood*, 28 U.S.P.Q.2d 1300 (Bd. Pat. App. & Inter. 1993). See also *In re Kotzab*, 217 F.3d 1365, 1371, 55 U.S.P.Q.2d 1313, 1318 (Fed. Cir. 2000) (Court reversed obviousness rejection involving technologically simple concept because there was no finding as to the principle or specific understanding within the knowledge of a skilled artisan that would have motivated the skilled artisan to make the claimed invention); *Al-Site Corp. v. VSI Int'l Inc.*, 174 F.3d 1308, 50 U.S.P.Q.2d 1161 (Fed. Cir. 1999) (The level of skill in the art cannot be relied upon to provide the suggestion to combine references.)”) (emphasis added).

⁸ See, *In re Lee*, 61 U.S.P.Q.2d 1430, 1434 (Fed. Cir. 2002) (“This factual question of motivation is material to patentability and could not be resolved on subjective belief and unknown authority. It is improper, in determining whether a person of ordinary skill would have been led to this combination of references, simply to “[use] that which the inventor taught against its teacher.” *W.L. Gore v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 U.S.P.Q. 303, 312-13 (Fed. Cir. 1983). Thus, the Board must not only assure that the requisite findings are made, based on evidence of record, but must also explain the reasoning by which the findings are deemed to support the agency’s conclusion.”) (emphasis added).

⁹ *In re Lee*, 61 U.S.P.Q.2d 1430, 1434 (Fed Cir. 2002) (“The examiner’s conclusory statements that the demonstration mode is just a programmable feature which can be used in many different device[s] for providing automatic introduction by adding the proper programming software and that another motivation would be that the automatic demonstration mode is user friendly and it functions as a tutorial do not adequately address the issue of motivation to combine. This factual question of motivation is material to patentability, and could not be resolved on subjective belief and unknown authority. It is improper, in determining whether a person of ordinary skill would have been led to this combination of references, simply to [use] that which the inventor taught against its teacher. *W.L. Gore v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 U.S.P.Q. 303, 312-13 (Fed. Cir. 1983). Thus, the Board must not only assure that the requisite findings are made based on evidence of record but must also explain the reasoning by which the findings are deemed to support the agency’s conclusion.”) (internal quotation marks omitted) (emphasis added).

¹⁰ See MPEP § 2155.05 (“A *prima facie* case of obviousness may also be rebutted by showing that the art, in any material respect, teaches away from the claimed invention. *In re Geisler*, 116 F.3d 1465, 1471, 43 U.S.P.Q.2d 1362, 1366 (Fed. Cir. 1997)”).

Harding is focused on producing a pet bed that resists damage caused by chewing of the components of the pet bed. Harding does not teach or suggest using the pet bed as part of a larger structure.

While Harding indicates that the pet bed is suitable for a variety of applications, the Harding pet bed is particularly suited for use by dogs. Unlike cats, dogs do not typically climb on structures because dogs do not have claws like cats. Rather than having a pet bed that is merely mounted above a ground surface, cats prefer structures that enable them to climb.

Similarly, Sherman et al. discloses an enclosure that is particularly suited for dogs. Unlike cats who are not typically kept in enclosures with only side walls because of their ability to jump and climb the walls of these types of enclosures, dogs are typically retained in enclosures with walls only.

The Sherman et al. enclosure includes a cover 111 that is pivotally mounted to the top of the walls. Pivoting the cover 111 with respect to the walls enables the portion of the enclosure that is covered by the cover 111 to be changed.

The Sherman et al. enclosure is intended to retain pets therein. Sherman et al. does not teach or suggest using the cover 111 to support animals, as this would be contrary to the primary function of the Sherman et al., namely, retaining pets in an enclosed area.

Additionally, Sherman et al. illustrates that the cover 111 is mounted at an angle. Mounting the cover 111 at an angle would preclude the cover 111 from being used as a bed support because the pet would have a difficult time laying or sitting on the angled surface of the cover 111.

Based upon the preceding comments with respect to both Harding and Sherman et al., neither of these patents provide a basis of combining the references as suggested by the Examiner.

In light of the preceding comments, it is submitted that independent Claim 1 would not be obvious when viewed in light of Harding and Sherman et al. Claims 4-9 depend from Claim 1. For the reasons set forth above, it is submitted that Claims 4-9 are also non-obvious when viewed in light of the cited references. Reconsideration and withdrawal of the rejection of Claims 1 and 4-9 are respectfully requested.

Similar to Claim 1, Claim 13 has been amended to add limitations relating to the pet bed structure having a support leg that extends into the non-terminal aperture to removably attached the pet bed structure to the vertical support member or the horizontal support member.

Similar to the comments set forth above, the references cited by the Examiner do not teach or suggest a modular pet furniture having all of the claimed limitations. In particular, using the support legs in conjunction with the non-terminal apertures enables the modular pet furniture.

In light of the preceding comments, it is submitted that independent Claim 13 would not be obvious when viewed in light of Harding and Sherman et al. If the Examiner wishes to maintain this rejection, the Examiner is invited to submit further evidence or a declaration that provides a basis for the teaching or suggestion of the combination of references.

Claim 15 depends from Claim 1. For the reasons set forth above, it is submitted that Claim 15 is also non-obvious when viewed in light of the cited references. Reconsideration and withdrawal of the rejection of Claims 13 and 15 are respectfully requested.

The Examiner rejected Claims 10-11 under 35 U.S.C. § 103 as being unpatentable over Harding in view of Sherman et al. and Cook, U.S. Patent No. 5,577,465.

As an initial point in responding to this rejection, it is noted that independent Claim 10 has been amended similar to independent Claim 1.

The Examiner cites Cook for teaching that the support members and joints can be connected in an array of many different configurations and plurality of regions. The Examiner then contends that “[i]t would have been obvious to one of ordinary skill in the art to further modify the teachings of Harding with the teachings of Cook at the time of the invention since the modification is merely the duplication of known members to create a multiple effect as taught by Cook to accommodate multiple animals at one time.”

As discussed above, both Harding and Sherman et al. relate to devices that are designed for use by dogs. Because of the significant differences in the behavioral habits of cats and dogs, merely combining elements of cat structures with elements of dog structures often is contrary to the intended function or benefit of the respective elements.

In this case, Harding’s pet support, Sherman et al.’s pet enclosure and Cook’s pet support array are sufficiently different such that there is no teach or

suggestion to combine the independent elements from these items as has been proposed by the Examiner. If the Examiner wishes to maintain this rejection, the Examiner is invited to submit further evidence or a declaration that provides a basis for the teaching or suggestion of the combination of references.

Claim 11 depends from Claim 10. For the reasons set forth above, it is submitted that Claim 11 is also non-obvious when viewed in light of the cited references. Reconsideration and withdrawal of the rejection of Claims 10 and 11 are respectfully requested.

The Examiner rejected Claim 14 under 35 U.S.C. § 103 as being unpatentable over Harding in view of Sherman et al. and Batterton, U.S. Patent No. 5,709,164. Claim 14 depends from claim 13. For the reasons set forth above, claim 13 is non-obvious when viewed in light of Harding, and Sherman et al. Batterton does not address the items not found in the preceding combination of references.

Accordingly, Claim 14 is non-obvious when viewed in light of Harding, Sherman et al. and Batterton. Reconsideration and withdrawal of this rejection are respectfully requested.

The Examiner rejected Claim 12 under 35 U.S.C. § 103 as being unpatentable over Harding in view of Sherman et al., Cook and Batterton. Claim 12 depends from claim 10. For the reasons set forth above, claim 10 is non-obvious when viewed in light of Harding, Sherman et al., and Cook. Batterton does not address the items not found in the preceding combination of references.

Accordingly, Claim 12 is non-obvious when viewed in light of Harding, Sherman et al., Cook and Batterton. Reconsideration and withdrawal of this rejection are respectfully requested.

CONCLUSION

In view of the foregoing, it is submitted that this application is in condition for allowance. Favorable consideration and prompt allowance of the application are respectfully requested.

The Examiner is invited to telephone the undersigned if the Examiner believes it would be useful to advance prosecution.

Very truly yours,



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